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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAVIER GARCIA et al., Defendants and Appellants.	B279122 (Los Angeles County Super. Ct. No. PA082688)

APPEAL from judgments of the Superior Court of Los Angeles County. Daniel B. Feldstern, Judge. Affirmed.

Mark Yanis, under appointment by the Court of Appeal for Defendant and Appellant Javier Garcia.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Oscar Sanchez.

Madeline McDowell, under appointment by the Court of Appeal, for Defendant and Appellant Christopher Aduata.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Marc A. Kohn and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Christopher Aduata (Aduata), Javier Garcia (Garcia) and Oscar Sanchez (Sanchez) (collectively defendants) were members of a criminal street gang who initiated a violent melee with Edgar Barrientos (Barrientos), Jordan Arteaga (Arteaga) and Cynthia Rodriguez (Rodriguez). During this violent melee, Aduata attempted to stab Arteaga and Rodriguez, and fatally stabbed Barrientos.

In an amended information, defendants were jointly charged with: murder of Barrientos (Pen. Code, § 187, subd. (a); count 1);[1] attempted willful, deliberate, and premeditated murder of Rodriguez (§§ 664/187, subd. (a); count 2); attempted willful, deliberate, and premeditated murder of Arteaga (§§ 664/187, subd. (a); count 3); assault with a deadly weapon on Rodriguez (§ 245, subd. (a)(1); count 4), and assault with a deadly weapon on Arteaga (§ 245, subd. (a)(1); count 5). It was alleged that the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subds. (b)(1)(B) & (C)).

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Aduata was tried as a direct perpetrator of the offenses. Garcia and Sanchez were tried as aiders and abettors of the offenses under the natural and probable consequences doctrine, the theory being that the offenses were foreseeable consequences of battery of Barrientos.

The trial court granted a motion for a judgment of acquittal on count 2 (§ 1118.1). As to count 1, the jury convicted Aduata of first degree murder and Garcia and Sanchez of second degree murder. The jury convicted all defendants on counts 3 through 5. In addition, the jury found the gang allegations to be true.

On count 1, Aduata was sentenced to 25 years to life and Garcia and Sanchez were sentenced to 15 years to life. On count 3, they all received life sentences to run consecutive to the sentences on count 1. As to counts 4 and 5, they all received concurrent two-year sentences, which were enhanced by five years due to the gang enhancement. The sentences on count 5 were stayed pursuant to section 654. Based on section 186.22, subdivision (b)(5), each defendant was declared ineligible for parole until serving 15 years of the sentences imposed on counts 1 and 3.

Defendants challenge the sufficiency of the evidence to support counts 1 and 3 as well as the gang enhancement, two evidentiary rulings, the trial court's instruction of the jury, and the trial court's denial of their right to a public trial. In supplemental briefs, Garcia and Sanchez argue that their convictions on counts 1 and 3 should be reversed because Senate Bill No. 1437—which amended section 188 defining malice for purposes of murder and section 189 defining degrees of murder, added section 1170.95, and became effective on January 1, 2019—retroactively abrogated the natural and probable

consequences theory of murder liability. We affirm the convictions. As to Garcia and Sanchez, we do so without prejudice to the filing of petitions in the sentencing court to vacate their murder and attempted murder convictions upon a requisite showing, including that they "could not be convicted of first or second degree murder because of changes to Section 188 or 189." (§ 1170, subd. (a).)

FACTS

The Victims and Defendants

In December 2014, Barrientos lived across the street from Arteaga and his girlfriend Rodriguez, and Arteaga considered Barrientos his best friend. Garcia and his parents lived next door to Barrientos.

Aduata, Garcia and Sanchez were members of the "Insane Fucks" tagging crew (IFC), which had a connection to the DT tagging crew.[2] The IFC had approximately 15 members, and its members used the IFC initials in graffiti, hand signs and tattoos, and they sometimes used Indian related sports logos. Its primary activities were felony vandalism and assault. Aduata's moniker was Psoe, Garcia's moniker was Fects, and Sanchez's moniker was Crudo. Arteaga was a former member of the LR tagging crew, a fact which he had disclosed to Garcia.

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[2] A gang expert opined that defendants were members of the IFC. On the date of the crimes, Aduata yelled out "DT, DT." Garcia had DT graffiti in his room. The gang expert testified that there appeared to be a connection between the DT tagging crew and the IFC, but the expert could not say whether DT was a clique within the IFC or related in another way.

The Dispute Over Tagging

Just prior to the events that gave rise to this case, someone painted IFC graffiti on the sidewalk and curb adjacent to Barrientos's house. He went to Garcia's house and spoke to Garcia's sister, saying he wanted to talk to Garcia "about some tagging that was on the floor." He was nice to Garcia's sister, calling her *mija*.[3] She said Garcia was asleep, so Barrientos gave his number to her so that Garcia and he could talk. On December 20, 2014, Garcia posted a message on Facebook to a friend stating, "Damn . . . , y[o]u need[] [to] come back[,] shit[] [is] poppin[g] on the block [because] I jus[t] got into it" with Barrientos and Arteaga. Garcia added that Barrientos complained to Garcia's sister about a spray can Garcia left on the ground, and then accused Garcia of tagging in front of Barrientos's house. At about 10:00 p.m., Garcia wrote, "That foo[l]'s gonna get it."

In gang culture, if a person complains about a gang member tagging in front of his house, that could be viewed as being disrespectful.

The Melee

Between 3:00 a.m. and 4:00 a.m. on December 21, 2014, Aduata drove Garcia's car toward Garcia's home, and Sanchez, Garcia and Garcia's girlfriend were all passengers. The four of them had been drinking. Aduata was aware that Garcia had previously had a dispute with one of his neighbors. During the drive, either Aduata or Sanchez said he had a knife.[4]

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[3] *Mija* is a term of endearment in Spanish.

[4] The jury could have reasonably inferred that it was Aduata who said he had a knife because the evidence showed that he was

When Aduata entered Garcia's neighborhood at 3:53 a.m., he drove in circles in the T-intersection in front of Barrientos's house for 30 seconds, then drove away only to return to the T-intersection, leave and return again. Arteaga heard a loud noise outside the front of his house. It sounded like "tires screech[ing], somebody burning rubber[.]" Barrientos exited his house and walked to the sidewalk. At about the same time, Arteaga and Rodriguez exited their house. Aduata did a U-turn. The defendants said something to Barrientos, and he smirked. At that point, Aduata did another U-turn and parked in front of Arteaga's house.

Sanchez got out of the car and approached Barrientos on the street corner and said, "What are you going to do? What are you going to do?" Garcia got out of the car and joined Sanchez. Aduata did another U-turn and parked on the other side of the street next to Barrientos, Garcia and Sanchez.

Arteaga and Rodriguez walked out of a pedestrian gate that was inset within their larger driveway gate, and Arteaga began crossing the street but was stopped when Aduata emerged from the car. Aduata said, "You're from LR" and "Fuck LR," and he announced his crew, saying, "DT, DT." According to Rodriguez, it was as if Aduata was "trying to get a reaction out of" Arteaga. During this exchange, Aduata was swinging a knife at Arteaga as he was backpedaling, and as Rodriguez was trying to get between them. First Arteaga and then Rodriguez went back through the same gate they had exited and stood just inside. Aduata tried to stab Arteaga through the bars of the gate. One of the stab

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the one who stabbed Barrientos. For purposes of this opinion, we indulge that very inference.

attempts came close to Rodriguez but she was saved from harm when Arteaga pulled her back.

At some point, Garcia, Sanchez and Barrientos crossed the street toward Arteaga's house, and then Garcia and Sanchez began fighting with Barrientos.[5] They migrated to the middle of the intersection where Garcia and Sanchez knocked Barrientos down and began hitting and kicking him. Garcia's parents came out of their house. Contemporaneously, Aduata ran to the middle of the intersection and began punching and kicking Barrientos along with Garcia and Sanchez.

The fighting abated, which allowed Barrientos to get up and walk toward his house. As Aduata and Garcia angled their way over to Garcia's car, Garcia and Arteaga proceeded to argue back and forth across the street while Arteaga was standing next to his pedestrian gate.

Garcia's father tried to get Garcia to go back into their house and saw Barrientos heading in their direction while holding a collapsible baton. Garcia's father yelled at Barrientos to stay away from Garcia. Barrientos turned, walked toward the intersection and extended the baton. Sanchez approached and said, "Are you going to use that?" Barrientos struck Sanchez on the arm with the baton, and Sanchez punched Barrientos in the jaw, knocking him to the ground. Sanchez and Aduata proceeded to punch and kick Barrientos. Garcia ran over and tried to get involved.

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[5] Arteaga testified that Garcia and Sanchez began hitting Barrientos. Garcia's father, on the other hand, testified that Barrientos lunged at Sanchez.

Arteaga saw the defendants beating Barrientos and, against Rodriguez's wishes, left the confines of his property to help his friend. While approaching the action in the street, Arteaga saw Aduata on top of Barrientos. Arteaga ran over to them, retrieved Barrientos's keys from the ground and used them to hit Aduata twice on the head. Aduata took out his knife, followed Arteaga as he retreated to his gate. Rodriguez grabbed Arteaga to pull him away, and Aduata attempted to stab both of them. The couple tried to take refuge behind their driveway gate, but Aduata forced the gate off of its tracks, entered the property, and then pursued Arteaga and Rodriguez into their backyard.

Meanwhile, back on the street, Garcia's mother grabbed Barrientos. She and her husband walked him to the yard of his house. Barrientos said that his homies were getting beat up. Because Garcia's father was concerned for the safety of Arteaga and Rodriguez, he walked over to Arteaga's house and heard a commotion that included Rodriguez screaming and multiple people cursing. Garcia's father went into Arteaga's backyard and yelled at Aduata and Sanchez to "get out."

As Aduata and Sanchez were walking down Arteaga's driveway, Barrientos appeared and struck Sanchez with the baton. Sanchez knocked him down and punched him repeatedly. While Barrientos was kneeling and trying to get up, Garcia's father put his hip and leg on Barrientos, pushed Sanchez away and tried to pry the baton out of Barrientos's hands. Also, Garcia's father started "slugging" Barrientos, and he perceived that his son was "kicking away" at Barrientos but did not know whether his son made contact. Garcia's father felt pushing and thought someone was hitting Barrientos. Eventually, Garcia's father pried the baton away from Barrientos. Someone screamed

Garcia's name, and Garcia's father straightened up, grabbed his son by the shirt and pushed him toward the pedestrian gate. Aduata and Sanchez ran past Garcia's father, exited Arteaga's property, and drove away.

Arteaga came out of his house and saw Barrientos standing in the driveway, covered in blood. Large quantities of blood were on the driveway where the attack happened. Garcia approached Arteaga and said, "Oh[,] you too, [Arteaga]? You wanna talk shit to my sister?" Garcia kept saying the name of a crew or gang. Barrientos ended up on the ground. He had multiple stab wounds.[6] They were to his face, head, upper body, and forearm. Three wounds to Barrientos's flank were gaping, meaning they were wide open on the skin's surface, and they were five to six inches deep. These particular wounds proved to be fatal because Barrientos's diaphragm and liver were perforated, and he bled into his chest cavity.

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[6] The autopsy report described 12 sharp force injuries. Aduata admitted to being responsible for the stabbing but claimed it was in self-defense after he was attacked by Barrientos with the baton. Based on the testimony of Garcia's father and Arteaga, and based on Aduata's admission that he stabbed Barrientos, the jury could have reasonably inferred that while Garcia's father was restraining Barrientos, Aduata reached around Garcia's father and repeatedly stabbed Barrientos. In other words, what Garcia's father perceived to be a third person hitting Barrientos was actually Aduata stabbing Barrientos. (*People v. Di Giacomo* (1961) 193 Cal.App.2d 688, 697 [jury has the prerogative to draw reasonably deducible inferences].)

Garcia's father eventually realized that his hand was cut and bleeding.[7]

Subsequent Instagram Posts

Instagram messages exchanged between Sanchez and Aduata were admitted into evidence. Sanchez posted, "Haha what a weekend." Aduata replied, "Serio holmes, nobody fucks with my fam. And if they do, they got [to] answer to machete!" Later, Sanchez wrote, "Haha . . . using nunchakus, haha." This prompted Aduata to write back, "I got down with Bruce Lee last night hah[a]." They each confirmed that they had not heard from Garcia. Sanchez then posted: "Fuck those fuckers better not [have] called the cops on him." Aduata replied, "I hope not dawg. No lie I think I might have killed him. My fuck[ing] clothes [are] drenched in blood." Sanchez then wrote, "Mines [*sic*] too my pants are covered in bitch blood hahaha."

Aduata's Testimony (in Conjunction with the Video)

Aduata testified that he had been drinking alcohol at a bar with Garcia and Sanchez before driving back to Garcia's neighborhood early on the morning of December 21, 2014. Either Garcia or Sanchez told Aduata to do "donuts" in the T-intersection near Garcia's house, so Aduata did. According to Aduata, when he first got out of Garcia's car, Arteaga was "yelling something about why you guys making so much noise" and telling Aduata, Garcia and Sanchez to leave. In response, Aduata told Arteaga to leave because they had "no issue" with him. Aduata walked toward Arteaga, and Arteaga started backing away. They argued "for a little bit." Aduata stood on the

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[7] The jury could have reasonably inferred that Garcia's father got cut while he was restraining Barrientos and Aduata was attacking with his knife.

sidewalk in front of Arteaga's gate and was joined by Garcia, Sanchez and Barrientos, who proceeded to argue about the noise. Then the first altercation involving Barrientos broke out when he lunged at Sanchez. Garcia and Sanchez chased Barrientos into the T-intersection, hit him and knocked him down, and then proceeded to stand over him while hitting and kicking him.

Aduata went on to testify that he tussled with Arteaga as the first altercation involving Barrientos moved to the corner. Per Aduata, he and Arteaga were "pushing back." At that point, Arteaga tried to punch Aduata before moving back behind his gate. While Arteaga was behind his gate, they argued and Arteaga said he was going to beat up Aduata because of the noise. After that, Aduata joined the fight with Barrientos and kicked him several times. Barrientos eventually walked away.

Subsequently, Aduata saw Barrientos hit Sanchez with the baton multiple times and a new altercation ensued. Arteaga and Rodriguez joined in. Aduata claimed that he went with Garcia to "get everybody off . . . [Sanchez]." At some point, someone hit Aduata from the back. He turned around and Arteaga was standing there. They started arguing, and Aduata followed Arteaga to his side of the street. Rodriguez was trying to push Arteaga back. Eventually, she pushed him inside his gate. Aduata went to the gate and continued to argue with Arteaga, who said, "I'm go[ing to] kick your ass," if Aduata came inside the gate. Aduata proceeded to go through the gate. They continued to yell at each other, and Arteaga was backing away. Aduata followed and they started fighting. According to Aduata, "He was kind of like pulling me around and punching me, and I was trying to do the same thing, basically." Rodriguez was pushing Arteaga away and slapping Aduata. She started screaming. Per Aduata,

they continued the fighting "to the back of [Arteaga's] house. He's kind of like pulling me, so we're going deeper and deeper into his property." Next, Aduata thought Arteaga "had the best of" him, so he pushed Arteaga "off." Aduata pulled out his knife "to kind of just back [Arteaga] off[.]" That was the first time he took it out. At no point did Aduata try to stab Arteaga. Rather, Aduata kept the knife at his side. Rodriguez screamed "to get out of her property" and she and Arteaga proceeded to disappear around a corner.[8]

While Aduata and Sanchez were leaving Arteaga's backyard, Barrientos stepped around a corner and attacked Sanchez with the baton. They started fighting. Aduata tried to push him off Sanchez, but failed. Barrientos turned his attention toward Aduata and, using the baton, hit him multiple times. The blows hurt, and Aduata was afraid of being seriously injured or killed. Moreover, Barrientos was barring Aduata's path off of Arteaga's property. To protect himself, Aduata swung his knife and traded stabs for baton blows. Barrientos hit Aduata on the shoulder, right side, ribs and face with the baton. Eventually, Aduata and Barrientos separated. Aduata and Sanchez got into Garcia's car and drove away.

DISCUSSION

I. Sufficiency of the Evidence.

Aduata and Garcia contend that there is insufficient evidence of deliberation and premeditation for counts 1 and 3,

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[8] Garcia's father testified that he saw Arteaga with a knife in his hand. But there was no testimony suggesting that Arteaga wielded it while interacting with Aduata, or that he threatened Aduata with it.

and that there was insufficient evidence to support their gang enhancements. As to all counts, Garcia contends that there is insufficient evidence to support criminal liability under the natural and probable consequences doctrine because Barrientos's decision to retrieve and use a baton was an independent intervening cause of the crimes.

Our task is to examine the record in the "'"light most favorable to the judgment to determine whether it discloses substantial evidence—that is evidence that is[] reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]'" [Citation.]'" (*People v. Howard* (2010) 51 Cal.4th 15, 34.) The evidence adduced amply meets this standard.

A. *Deliberation and Premeditation.*

To convict a defendant of first degree murder and attempted premeditated murder, the prosecution must prove beyond a reasonable doubt that the defendant acted with deliberation and premeditation. (§ 189 [first degree murder includes any "willful, deliberate, and premeditated killing"]; § 21a ["An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission"].) "'"Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance.'" (*People v. Sandoval* (2015) 62 Cal.4th 394, 424, quoting *People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) What matters is "'the extent of the [defendant's] reflection,'" not the "'duration of time'" in which it takes the defendant to act. (*Ibid.*) Premeditation and deliberation can take place over a quick interval. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1069.) Courts consider three nonexhaustive factors when assessing whether a defendant

committed murder with deliberation and premeditation: (1) motive, (2) planning activity, and (3) manner of killing. (*People v Cage* (2015) 62 Cal.4th 256, 276.)

1. Count 1.

There was substantial evidence that Barrientos's murder was the result of deliberation and premeditation.

The gang expert's testimony explained that Barrientos disrespected Garcia by complaining about Garcia's gang graffiti. Also, Garcia had written on Facebook, "That foo[l]'s gonna get it," indicating Garcia's intent to retaliate against Barrientos. As Garcia's friend and a member of the IFC, Aduata had a motive to retaliate violently against Barrientos. There was evidence of planning because Aduata brought a knife with him, and he talked about having a knife on the car ride to the melee. (*People v. Lee* (2011) 51 Cal.4th 620, 636 [bringing "a loaded handgun . . . indicat[ed]" that the defendant was "consider[ing] the possibility of a violent encounter"]; *People v. Elliot* (2005) 37 Cal.4th 453, 471 ["That [the] defendant armed himself [with a knife] prior to the attack 'supports the inference that he planned a violent encounter'"].) Further, Aduata drove in circles in front of Barrientos's and Arteaga's homes, which caused them to exit their homes. The inference is that Aduata planned this action in order to force a confrontation. Finally, the manner of killing was brutal. Aduata stabbed Barrientos multiple times in the face, head and chest, locations where they were most lethal. Also, this occurred while Barrientos was being restrained by Garcia's father. The foregoing demonstrated that Aduata killed Barrientos after deliberation and premeditation. (*People v. Pride* (1992) 3 Cal.4th 195, 247–248 [victim stabbed 17 times in the torso while the defendant held her down established

premeditation]; *People v Perez* (1992) 2 Cal.4th 1117, 1127–1129 [retrieval of second knife to continue stabbing victim after first knife broke indicated premeditation].)

Aduata testified that he does not have a Facebook account and that he never saw Garcia's Facebook posts about Garcia's dispute with Barrientos. Also, Aduata testified that even though he knew Garcia had a dispute with a neighbor, Aduata but did not know the identity of that neighbor. Based on this, Aduata argues that there was no evidence that he had a motive to kill Barrientos or a corresponding plan. The jury, however, was free to disbelieve this testimony and conclude that because Aduata and Garcia were friends and members of the IFC, Aduata knew about Barrientos. This is particularly so given that Aduata twice did donuts in front of Barrientos's house in a provocative manner.

2. Count 3.

We conclude there was substantial evidence that Aduata's attempted murder of Arteaga was the result of deliberation and premeditation.

Aduata had motive to kill Arteaga. This was established by Garcia's Facebook posts indicating that his dispute was with Arteaga as well as Barrientos. The inference is that Aduata was well aware of this dispute based on his friendship with Garcia and membership in the same gang. Also, when Arteaga tried to come to Barrientos's aid, Aduata accused him of being in a rival gang and swung a knife at him, all the while announcing a gang affiliation with DT. This evidence indicated that Aduata had talked to Garcia about Arteaga and, based on that, harbored ill will toward him. In addition, there was evidence of planning because Aduata brought the knife to the melee and talked about possessing a knife while driving to the melee. Further, Aduata

drove in circles in front of Barrientos's and Arteaga's homes, which provoked them into exiting their homes. The inference is that driving in circles as a provocation was part of a plan. Finally, Aduata's repeated attempts to stab a backpedaling Arteaga through the bars of his gate and then deep into his property—after their initial confrontation and after Arteaga hit Aduata on the head—indicated a desire to kill and the fruition of a premeditated plan.

Alternatively, the evidence was sufficient to establish either that (1) Aduata planned to kill Barrientos and anyone who tried to interfere with that plan, or (2) after Arteaga tried to come to Barrientos's aid after defendants got out the car, and also when Barrientos was being beaten in the street, Aduata had time to reflect and then determined that Arteaga should be killed for his attempt to interfere.

Regardless of the scenario—a preexisting plan or a plan formed on the spot—Aduata's violent, vehement and persistent attacks went so far beyond the pale that the reasonable inference is that he was executing a plan.

B. *Gang Enhancements.*

Aduata and Garcia argue that their gang enhancements must be reversed because there was insufficient evidence of the IFC's primary activities, of its pattern of criminal activity, and of the crimes at issue being committed for the benefit of, in association with, or at the direction of the IFC. (§ 186.22, subd. (b)(1).) As we discuss, the gang enhancements were adequately supported by the opinion and personal observations of the prosecution's gang expert in conjunction with the other gang related evidence.

1. Primary activities.

A criminal street gang is any ongoing organization, association or group of three or more persons (1) having as one of its primary activities the commission of statutorily enumerated criminal acts, (2) having a common name or common identifying sign or symbol, and (3) whose members individually or collectively engage in a pattern of criminal gang activity. (§ 186.22, subd. (f).)

"The phrase 'primary activities' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) An expert opinion based on personal experience with gang members, investigations into gang crimes, and information obtained from colleagues can establish a gang's primary activities. (*Id.* at p. 324.)

Substantial evidence supports the jury's finding that felony vandalism, an enumerated crime (§ 186.22, subd. (e)(20)), is one of the IFC's primary activities. Felony vandalism includes an act that defaces real or personal property with graffiti when the defacement is $400 or more. (§ 594, subds. (a) & (b).) The People's gang expert testified that while investigating the case he saw photographs of graffiti from Garcia's Facebook page, Instagram and Facebook messages that mentioned the use of rollers to make graffiti, and such items as spray cans, spray masks, nozzle caps, a respirator, and an I.F. stencil. Some of the graffiti was large; one instance of graffiti was 30 to 50 feet long. The expert testified that he believed that damage caused by such

large graffiti would take more than $500 to remediate. Some of this graffiti was on freeway underpasses or drainage areas. Another instance of graffiti was on an industrial fence. Relying on personal observations, training with respect to gangs, years of experience as a gang officer and gang detective, the expert opined that felony vandalism was one of the IFC's primary activities.

Aduata and Garcia argue there was no independent proof that any of the graffiti associated with the IFC would require more than $400 to repair. In other words, they contend it was insufficient for the expert to offer an opinion regarding the remediation costs associated with graffiti because he saw it only in photographs. But the expert was permitted to rely on his training and experience in conjunction with the photographs when forming an opinion.

Garcia contends that the expert's opinion regarding felony vandalism fails for the additional reason that no evidence established whether the graffiti was unwanted as opposed to artwork welcomed by the property owners. (§ 594, subd. (e) ["As used in this section, the term 'graffiti or other inscribed material' includes any unauthorized inscription, word, figure, mark, or design, that is written, marked, etched, scratched, drawn, or painted on real or personal property"].) Boiled down to its essence, Garcia argues that the evidence failed to establish that the graffiti was maliciously committed, which is required by the statute, because there may have been consent, i.e., if there was consent, then the graffiti was not malicious. (§ 594, subd. (a) [vandalism is an act committed maliciously].) But certainly lack of consent was implicit in the expert's opinion that the graffiti was felony vandalism. This was entirely proper. Section 594, subdivision (a) provides, in part, that whenever a person violates

the subdivision with respect to real property, or any property belonging to a public entity, "it shall be a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy the property." We conclude that the jury was permitted to generally infer there was no permission, and to specifically make this inference based on the expert's testimony as well as the nefarious purpose of gang graffiti and the blight it causes. Garcia cites no law to rebut this analysis.

At one point, based on social media messages, the expert testified that the IFC engaged in assaults as a primary activity. Aduata and Garcia argue that this testimony was deficient because there was no evidence of actual assaults, and because "assault" is not an enumerated crime under section 186.22, subdivision (e). That statute only enumerates assault with a deadly weapon or force likely to cause great bodily injury. (§ 186.22, subd. (e)(1).) We need not reach this issue because felony vandalism is an enumerated crime and therefore supports the enhancements.

2. Pattern of criminal activity.

The prosecutor was permitted to prove "the requisite 'pattern of criminal gang activity' by evidence of 'two or more' predicate offenses committed 'on separate occasions' *or* by evidence of such offenses committed 'by two or more persons' on the same occasion." (*People v. Loeun* (1997) 17 Cal.4th 1, 10.) As to this second option, the prosecutor was able to "rely on evidence of the defendant's commission of the charged offense and the contemporaneous commission of a second predicate offense by a fellow gang member." (*Ibid.*) Here, the charged offenses of murder, attempted murder and assault with a deadly weapon

were committed by two or more IFC members and established a pattern of criminal activity. (§ 186.22, subd. (e)(1), (3).) In addition, there was substantial evidence that defendants committed the charged offenses and IFC members committed multiple acts of felony vandalism on separate occasions. (§ 186.22, subds. (e)(1), (3) & (20).) These crimes—all of them, or just the felony vandalism—independently established the requisite pattern.

Aduata and Garcia contend that charged offenses cannot be used to prove both a gang's primary activity and also a pattern of gang activity. This argument is moot because we have concluded that the evidence of felony vandalism was sufficient to establish a primary activity of the IFC.

3. Crimes committed for the benefit of, in association with, or at the direction of a criminal street gang.

The prosecutor presented the People's gang expert with a hypothetical hewing close to the facts of this case and then asked if it was the expert's opinion that the crimes were committed in association with a gang and with the specific intent to promote and further its criminal conduct. The expert offered his opinion by saying "yes." In conjunction with evidence regarding the defendants' membership in the IFC, their knowledge of each other's membership, Garcia's desire to retaliate against Barrientos for complaining about gang graffiti, how they committed the charged crimes in concert with each other, and the expert's learning and experience regarding gangs, the expert's opinion supported a finding that the charged crimes were committed in association with a gang with the specific intent required by section 186.22, subdivision (b)(1). (*People v. Vang* (2011) 52 Cal.4th 1038, 1048; *People v. Leon* (2008) 161 Cal.App.4th 149, 163.)

Aduata and Garcia argue the record fails to support the expert's additional opinion that the crimes were committed for the benefit of the gang. We need not reach this argument because the enhancement was supported by the expert's "in association with" opinion.

C. *Natural and Probable Consequences.*

Garcia makes no attempt to categorize his argument regarding the natural and probable consequences doctrine. Rather, he simply argues that his convictions must be reversed as a matter of law. We take this to be a challenge to the sufficiency of the evidence.

An aider and abettor is guilty not only of the crime he or she intends to aid and abet, """"but also of any other crime the perpetrator actually commits . . . that is a natural and probable consequence of the intended crime."""" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1228–1229.)[9]

When deciding if a defendant is criminally liable as an aider and abettor under the natural and probable consequences doctrine, a "jury must decide whether the defendant (1) with knowledge of [a] confederate's unlawful purpose, and (2) with the intent of committing, encouraging, or facilitating the commission of any target crime(s), (3) aided, promoted, encouraged, or instigated the commission of the target crime(s); whether (4) the defendant's confederate committed an offense *other than* the

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[9] A defendant aids and abets a crime when he or she (1) acts with knowledge of the unlawful purpose of the perpetrator, (2) intends to commit, encourage or facilitate the commission of the crime, and (3) by acts or advice, aids, promotes, encourages or instigates the commission of the crime. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 295–296.)

target crime(s); and whether (5) the offense committed by the confederate was a natural and probable consequence of the target crime(s) that the defendant encouraged or facilitated." (*People v. Prettyman* (1996) 14 Cal.4th 248, 267 (*Prettyman*).) In addition, controlling law requires that "a reasonable person in the defendant's position would have or should have known that the nontarget offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant." (*People v. Chiu* (2014) 59 Cal.4th 155, 166 (*Chiu*).) An aider and abettor need not foresee every element of a crime; rather, the question is whether the resulting harm or criminal act causing the harm were reasonably foreseeable. (*Id.* at p. 165.)

Garcia focuses on the second element. The question, consequently, is whether a reasonable person in his position would have recognized that the nontarget crimes were reasonably foreseeable consequence of the target crime of battery. (*Chiu, supra,* 59 Cal.4th at p. 165.) All case law requires is that the nontarget crime be a ""possible consequence which might reasonably have been contemplated[.]"" (*People v. Medina* (2009) 46 Cal.4th 913, 920.) The nontarget crime ""need not have been a strong probability[.]"" (*Ibid.*) Moreover, it does not matter "'whether the aider and abettor *actually* foresaw the [nontarget] crime.'" (*Ibid.*)

Here, Garcia had a dispute with Barrientos and Arteaga, and wanted to retaliate against Barrientos for complaining about IFC graffiti. On the night of the melee, Garcia proceeded to his neighborhood with Aduata and Sanchez while Aduata was armed with a knife. The inference is that Aduata and Sanchez knew of Garcia's dispute. They drove in circles with screeching tires, which provoked Barrientos and Arteaga into coming out of their

respective homes. It was reasonably foreseeable that the ensuing battery of Barrientos—which Garcia aided and abetted—would escalate to the charged crimes. In other words, it was a possible consequence that Barrientos and Arteaga would respond to defendants' provocations, that a confrontation would ensue and escalate, and Aduata would use his knife to kill, attempt to kill, and commit assault.

To push back against criminal liability, Garcia relies on the concept of an independent intervening cause as set forth in *People v. Cervantes* (2001) 26 Cal.4th 860, 871 (*Cervantes*) as it relates to the provocative act doctrine. As we elaborate below, Garcia's attempt to shoehorn provocative act doctrine principles into this case must fail.

"A provocative act is one that goes beyond what is necessary to accomplish an underlying crime and is dangerous to human life because it is highly probable to provoke a deadly response." (*People v. Gonzalez* (2012) 54 Cal.4th 643, 655 (*Gonzalez*).) A murder conviction under this doctrine "requires proof that the defendant personally harbored the mental state of malice, and either the defendant or an accomplice intentionally committed [the] provocative act[.]" (*Ibid.*) Thus, "when the perpetrator of a crime maliciously commits an act that is likely to result in death, and the victim kills in reasonable response to that act," or a police officer kills in the performance of his or her duty, "the perpetrator is guilty of murder." (*Ibid.*; *Cervantes*, *supra*, 26 Cal.4th at p. 868.) The idea is that the victim's self-defensive killing or the police officer's performance of his or her duty is "generally found to be a natural and probable response to the defendant's act, and not an independent intervening cause that relieves the defendant of liability. [Citations.]" (*Gonzalez*,

supra, 54 Cal.4th at pp. 655–656; *Cervantes*, *supra*, 26 Cal.4th at p. 868.) The question is proximate cause. Generally, proximate cause is established when an act is directly connected with the resulting injury, and when there is no independent intervening force in operation. (*Id*. at p. 866.) To be independent, an intervening cause must be unforeseeable. (*Ibid*.) If an intervening cause is a normal and reasonably foreseeable result of the defendant's original act, the intervening act is dependent and will not exonerate a defendant. (*Ibid*.)

The provocative act doctrine does not come into play when the killer is an accomplice. Rather, it comes into play when "'the defendant, or a *surviving accomplice* in the underlying crime, commits an act, the natural and probable consequence of which is the use of deadly force by a third party.'" (*People v. Johnson* (2013) 221 Cal.App.4th 623, 629.)

According to Garcia, Barrientos's decision to retrieve a collapsible baton and return to the melee on two occasions with it was an independent intervening cause of his own death as well as the attempted murder and assaults. We fail to appreciate Garcia's argument because this is not a relevant inquiry under the natural and probable consequences doctrine. The question is foreseeability, not proximate cause. Even though proximate cause analysis in the provocative act doctrine has a foreseeability element, it is an entirely different inquiry that does not apply here. As we have explained, foreseeability was established. To be complete, it bears noting that Aduata committed the murder, attempted murder, and assaults, not Barrientos. The principles of independent intervening cause, as set forth in *Cervantes*, only apply to deadly force by a third party. Because Garcia aided and

abetted Aduata, they were both perpetrators, and Aduata was not a third party.

Next, Garcia argues that though Barrientos's retrieval of the baton was conceivable, it was not foreseeable. This is simply an attempt to dress up the independent intervening cause argument in different garb. Consequently, we need not address this argument further.

II. Evidentiary Rulings.

The defendants contend that the trial court abused its discretion under state law and violated their due process right to present a defense when it excluded evidence on Evidence Code section 352 grounds that (1) Barrientos had been charged with murder in 1998 and subsequently pled guilty to voluntary manslaughter for a 181-day county jail sentence and three years of probation, and (2) Barrientos had "187" (the number of the section of the California Penal Code for murder) tattooed on his arm. Pursuant to state law, these rulings are subject to review for an abuse of discretion. (*People v. Powell* (2018) 5 Cal.5th 921, 961.) The constitutional issues, on the other hand, trigger de novo review. (*Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425, 433.)

Insofar as defense counsel never sought the admission of Barrientos's 1998 charge and plea (and insofar as the trial never had reason to rule on their admissibility), the defendants argue they were provided with ineffective assistance of counsel. De novo review is applicable. (*People v. Washington* (2017) 15 Cal.App.5th 19, 25.)

The trial court did not commit evidentiary error, nor did it violate defendants' due process rights. There is no merit to the ineffective assistance of counsel argument.

A. *Pertinent Facts.*

1. The 1998 homicide.

Prior to trial, Aduata filed a motion to introduce evidence that Barrientos killed Stephen Corey Redden (Redden) in 1998 to prove Barrientos's character for violence under Evidence Code section 1103. To prove the killing, Aduata proposed to introduce the testimony of the investigating officer and the prior recorded testimony of an eyewitness. Garcia and Sanchez joined.

Regarding the killing, the motion presented the following facts. On May 10, 1998, Barrientos's brother exchanged gang challenges with Christopher Alexander (Alexander) at a fast food restaurant. Barrientos attacked Alexander. Then, at some point, Barrientos's brother got into a confrontation with Redden. The four men ended up in the parking lot of the fast food restaurant, and Barrientos stabbed Redden. Barrientos was charged with murder and pleaded to voluntary manslaughter. He was sentenced to formal probation on the condition that he serve 181 days in county jail. He received 121 days of credit for time already served in custody.

At the hearing on the motion, the trial court asked defense counsel: "How do you expect this to be played before the jury, this evidence of this 1998 event involving Mr. Barrientos?" Defense counsel replied: "As I spelled out in my moving papers, again for the record what we're talking about is a killing that was committed on May 10th, 199[8], by [Barrientos] where the victim was [Redden]. And, again for the record, [] Barrientos was prosecuted by the Los Angeles District Attorney's Office for the crime of murder. A preliminary hearing was held. [] Barrientos was held to answer on the charge of murder, and eventually pled guilty to a charge of voluntary manslaughter." He then stated:

"So, my intention [is] to prove up the prior killing of [] Redden by [] Barrientos . . . through the testimony of the homicide detective . . . and through the prior recorded testimony of" a currently unavailable witness to the incident who testified at the preliminary hearing.

There was no discussion of defense counsel proving the charges against Barrientos or his plea. The colloquy focused on evidence of the killing. Apparently, the only evidence of the killing was Barrientos's statement to a police officer that he stabbed Redden in self-defense or defense of his brother. The trial court stated that the preliminary hearing "was as muddled a preliminary hearing . . . as you could possibly see" and that "anybody reading it would walk away thinking, especially a prosecutor, that they inherited a very dubious case, to say the least." It appeared to the trial court that the witness Aduata intended to rely on contradicted two other witnesses and "got Barrientos mixed up with [Barrientos's brother]." According to the trial court, defense counsel was essentially asking the trial court to allow the jury to read the entire preliminary hearing transcript. It then stated, "And all you walk away [with] is that more likely than not [Barrientos's] brother was the one involved in the act of violence against [] Alexander and no one saw anything having to do with the stabbing." The trial court signaled that the prosecutor must have thought the case was very weak because the sentence was "the kind of sentence that you give to a first-time drug dealer standing on the street corner[.]"

Continuing on, the trial court stated, "The odds are against letting this in [because] it is a singular act and, if you look at the statement of [] Barrientos, it's a claim of self-defense, one stab wound in the middle of a fracas where he and his brother are

being threatened." The trial court believed that to "bring this in front of a jury [as] propose[d] [would be] confusing and . . . unfair." Ultimately, it would be "a trial within a trial."

Defense counsel suggested that the trial court's analysis would have to change if the defense could locate and produce Alexander. The trial court stated that if the defense produced Alexander, it would "probably have to have a hearing and find out what's there." It excluded the evidence on a preliminary basis and then said, "If it's not talked about again, it's a final ruling."

2. The "187" tattoo.

During trial, the prosecutor moved to exclude a coroner's photograph showing that Barrientos had the number "187" tattooed on his right arm. Defendants argued that the tattoo was most likely a reference to the prior murder charge against Barrientos in 1998. Also, they argued that because their own tattoos were relevant at trial, then Barrientos's tattoos were therefore relevant.

The trial court stated, "I will exclude that particular photograph under [Evidence Code section] 352. There is no probative value that I see other than the wound that's there, which can be replaced by another photograph. And the prejudice, of course, with the 187, is the charge of murder. So that will be the order."

B. *Analysis.*

1. The 1998 homicide.

Garcia and Sanchez admit that the trial court "ruled the evidence was inadmissible pursuant to Evidence Code section 352," and they do "not take issue with the trial court's finding that the evidence underlying this offense was conflicting and that

re-litigating the facts underlying this incident would be potentially confusing and unduly time consuming." Nonetheless, they argue that "the trial court erred by not at a minimum permitting the defense to introduce into evidence the facts that Barrientos was previously charged with murder based on this 1998 incident and subsequently entered into a plea to the crime of voluntary manslaughter." They essentially suggest that the trial court erred by not admitting evidence that *the defense did not ask to admit*. This argument was waived due to a lack of supporting authority. (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862.)

Moreover, we conclude that even if defendants received constitutionally deficient assistance of counsel when their attorneys failed to seek admission of the charge and plea, defendants were not prejudiced. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

A victim's prior acts of violence are admissible under Evidence Code section 1103 to prove his character for violence, and to prove that he acted in conformity with that trait. (Evid. Code, § 1103, subd. (a); *People v. Fuiava* (2012) 53 Cal.4th 622, 695–696.) Defendants argue that evidence of the charge and plea would have suggested Barrientos was a violent person, and that this would have supported the argument that Aduata acted in perfect or imperfect self-defense because Barrientos was the aggressor. But the charge and plea did not directly prove a prior act of violence. Nor did they provide a solid inference of a prior act of violence in the absence of any context and in light of the prosecution's apparent conclusion that, at most, Barrientos acted in imperfect self-defense. Further, the fact that Barrientos did not back down from a confrontation with defendants and twice

attacked Sanchez with a baton established Barrientos's propensity for violence. Despite the evidence of Barrientos's willingness to engage in violent acts, the jury still concluded that Aduata did not act in perfect or imperfect self-defense. There is no reasonable probability (*People v. Mesa (*2006) 144 Cal.App.4th 1000, 1008) that the dubious inferences to be gleaned from the 1998 charge and plea would have resulted in defendants obtaining a better result.

2. The "187" tattoo.

Evidence Code section 352 provides that "a trial court has broad discretion to exclude evidence 'if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*People v. Peoples* (2016) 62 Cal.4th 718, 757.) We conclude the trial court ruled within its discretion under Evidence Code section 352 when it excluded evidence that Barrientos had a "187" tattoo.

On appeal, Sanchez and Aduata argue that "the fact that Barrientos was enamored enough with the commission of violent acts such as murder [that he chose] to get a '187' tattooed on his arm was relevant to the issues of self-defense, imperfect self-defense, sudden quarrel, involuntary manslaughter, and premeditation and deliberation. . . . While the '187' tattoo may well have been a reference to the prior murder charge against Barrientos and the prior killing of the victim in that case . . . , it was relevant in any event because it could be reasonably inferred by the jury that non-violent people generally do not get '187' tattoos on their body as a tribute to the commission of murder." Garcia argues that "[n]obody would get such a tattoo unless they

were proud of having committed murder and they identified strongly enough with their violent disposition to memorialize it[.]" These arguments—which are being raised for the first time on appeal—are waived. (*People v. Clark* (2016) 63 Cal.4th 522, 584.)

Regardless, we find no error. Without any context—such as there being a correlation between those who have "187" tattoos and a propensity for violence—the tattoo had minimal probative value. (Cf., *People v. Ochoa* (2001) 26 Cal.4th 398, 437–438 [admitting evidence of "187" tattoo along with expert testimony explaining it signified hard-core status in a gang, and further explaining that defendant got the tattoo on his forehead after the charged homicides occurred].) Admission of the tattoo would have created a substantial danger of undue prejudice by encouraging the jury to erroneously speculate that Barrientos was violent or had committed murder when there was no evidence that he had been violent without believing he had to either act in self-defense or in the defense of another person, or that he was in fact a murderer.

III. Jury Instructions.

Defendants posit instructional error based on the trial court omitting required instructions and giving instructions that were not formulated properly. Whether the trial court properly instructed the jury is subject to de novo review. (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1013.) As we discuss, the trial court did not omit any required instructions, and to the degree some of the individual instructions were improperly formulated, the instructions taken as a whole adequately informed the jury of the necessary principles.

A. *Omitted Instructions*.

A trial court must instruct a jury on a lesser included offense if the record contains substantial evidence from which a jury could reasonably conclude that the defendant was guilty of that offense but not the charged offense. (*People v. Barton* (1995) 12 Cal.4th 186, 201 (*Barton*).) A defendant does not have a unilateral right to an instruction on a lesser related offense. But such an instruction must be given if the prosecution consents. (*People v. Birks* (1998) 19 Cal.4th 108, 136 (*Birks*).) A trial court must instruct on the general principles of law connected to the facts before the court and that are necessary for the jury's understanding of the case. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047 (*Montoya*).)

As discussed below, *Barton* did not require the trial court to instruct on heat of passion voluntary manslaughter, heat of passion attempted voluntary manslaughter, or involuntary manslaughter arising from a misdemeanor. Under *Birks*, the trial court did not have a duty to instruct on battery as a lesser related offense. The absence of an instruction on the requirements of self-defense as it relates to the uncharged offense of battery was not *Montoya* error.

1. Failure to instruct on voluntary manslaughter and attempted voluntary manslaughter based on heat of passion as lesser included offenses.

A defendant commits voluntary manslaughter or attempted voluntary manslaughter rather than murder or attempted murder if he or she intentionally and unlawfully tries to kill another upon a sudden quarrel or heat of passion. (§ 192, subd. (a); *People v. Gutierrez* (2003) 112 Cal.App.4th 704, 708–709 (*Gutierrez*).) The passion aroused can be any violent, intense,

high-wrought or enthusiastic emotion, but it cannot be revenge. (*People v. Breverman* (1998) 19 Cal.4th 142, 163 (*Breverman*).)

Provocation is the key to reducing murder or attempted murder to voluntary manslaughter or attempted voluntary manslaughter. (*People v. Moye* (2009) 47 Cal.4th 537, 549 (*Moye*); *Gutierrez*, *supra*, 112 Cal.App.4th at pp. 708–709.) "'The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.]'" (*Moye*, *supra*, pp. 549–550.) There is an objective (reasonable person) component and a subjective component at play. "'The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation or reflection. [Citations.]'" (*Ibid.*) In addition, the evidence must show that the defendant killed under the actual influence of a strong passion induced by the provocation. (*Ibid.*)

"A defendant may not provoke a fight, become the aggressor, and, without first seeking to withdraw from the conflict, kill [or attempt to kill] an adversary and expect to reduce the crime to [voluntary] manslaughter [or attempted voluntary manslaughter] by merely asserting that it was accomplished upon a sudden quarrel or in the heat of passion. The claim of provocation cannot be based on events for which the defendant is culpably responsible. [Citations.]" (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83 (*Oropeza*); *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1312 (*Johnston*).)

Normally, a heat of passion instruction supplements a self-defense instruction. Nonetheless, a heat of passion "instruction

is not always warranted[.]" (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1138.)

All three defendants argue that the trial court erred in not instructing the jury on the crime of voluntary manslaughter due to Aduata's heat of passion as a lesser included offense to the charged murder of Barrientos. They also argue that the trial court erred in not instructing the jury on the crime of attempted voluntary manslaughter due to Aduata's heat of passion as a lesser included offense to the charge of attempted murder of Arteaga. Plainly stated, they say the jury should have been able to consider whether Aduata acted in a heat of passion during the stabbings and attempted stabbings.

Garcia and Sanchez additionally argue that when a prosecutor proceeds on a natural and probable consequences theory of liability, the trial court must instruct on a lesser offense when the facts support a determination that the greater offense was not a reasonably foreseeable consequence but the lesser offense was. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1577–1578 (*Woods*).)

a. *Count 1 (Murder of Barrientos).*

Based on the version of the stabbing favorable to the prosecution, a heat of passion instruction was not warranted. In that version, Aduata provoked Barrientos into coming out of his house, attacked him twice in the middle of the street, and then stabbed him while he was being restrained on Arteaga's driveway by Garcia's father. Moreover, there is a strong inference that Aduata's motive was to avenge the disrespect Barrientos had showed to Garcia. As *Breverman* established, revenge based passion is excluded from the list of types of passion and/or

emotion that can nullify malice and reduce a homicide to voluntary manslaughter.

As for the version of the stabbing testified to by Aduata, as supplemented by the video of certain events, it also establishes that he provoked Barrientos. First, it was by driving a car in circles at 3:53 a.m. and causing Barrientos to exit his house and walk to the street because of the noise caused by the screeching of tires.[10] Then it was by kicking Barrientos in the first altercation in the street involving Garcia and Sanchez and engaging with Barrientos in the second altercation in the street with Sanchez. Then it was by pulling Arteaga's gate off of its tracks and pursuing Arteaga and Rodriguez onto their property. Last, it was by trying to pull Barrientos away during the last altercation with Sanchez.

On top of the preceding facts, it was undisputed that Aduata, Garcia and Sanchez were gang members, Garcia was upset that a neighbor was complaining about gang graffiti, and that Aduata brought a knife to a precipitated confrontation. Further, Aduata did not seek to withdraw from the conflict with Barrientos. The evidence establishes that the whole melee occurred over about seven minutes. Though Barrientos left the battle field and returned several times, Aduata never withdrew from the area. Instead, he kept engaging with Barrientos and Arteaga. Based on these facts, Aduata is culpably responsible for the melee that led to the stabbing of Barrientos. (*Oropeza*, *supra*, 151 Cal.App.4th at p. 83; *Johnston*, *supra*, 113 Cal.App.4th at

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[10] Aduata admits there was "evidence that [he] and his co-defendants were looking for some sort of confrontation with Barrientos[.]"

p. 1312.) Once again, we conclude that the urged instruction was not warranted.

Johnston bolsters our decision. In that case, the defendant armed himself with a knife and went to his girlfriend's house to speak with her. He arrived early in the morning and pounded on the door, walls, and windows, demanding that she come out. Her mother told the defendant to leave. Enraged, he shouted obscenities, threatened to kill the entire family, and refused to leave. He repeatedly challenged the ex-girlfriend's brothers to come out and fight. Unarmed, one brother exited the house and a fight ensued. During the fight, Johnston pulled out a knife and repeatedly stabbed the brother, killing him. (*Johnston*, *supra*, 113 Cal.App.4th at p. 1302.)

The defendant was convicted of second degree murder but the trial court reduced it to voluntary manslaughter based on sudden quarrel/heat of passion. (*Johnston*, *supra*, 113 Cal.App.4th at p. 1302.) *Johnston* reversed and reinstated the murder conviction. (*Id*. at p. 1303.)

The court reasoned: "We may assume that defendant did not travel to his ex-girlfriend's residence for the purpose of committing a homicide, even though he armed himself with a knife before going there. But it was he who instigated the fight with [the brother] by creating a loud disturbance at the residence, cursing the mother of the victim and girlfriend and, most particularly, challenging [the brother] to come out and fight. Having done that, he cannot be heard to assert that *he* was provoked when [the brother] took him up on the challenge. Defendant was 'culpably responsible' for the altercation." (*Johnston*, *supra*, 113 Cal.App.4th at p. 1313.)

Aduata's conduct—driving Garcia's car in circles with screeching tires to provoke Barrientos and then repeatedly attacking and engaging him—was no less a provocation of the victim than was the case in *Johnston*.

b. *Count 3 (Attempted Murder of Arteaga).*

The evidence favorable to the prosecution painted the picture that as soon as Arteaga went to assist Barrientos as he was first talking to Garcia and Sanchez, Aduata got in Arteaga's path and was verbally belligerent. Then Aduata took out a knife and began swinging it at Arteaga. (The video showed Arteaga backpedaling within seconds of getting near Aduata and his car.) Even after Arteaga moved behind his gate, Aduata tried to stab Arteaga through the gate. This version of the events does not suggest provocation by Arteaga.

It is true that the prosecution's evidence suggests that after Arteaga hit Aduata in the head, Aduata once again tried to stab Arteaga. Perhaps Aduata would contend he should have had a heat of passion instruction solely with respect to that second series of stabbing attempts. But based on the evidence, Aduata provoked Arteaga into coming outside by driving in circles, and then by trying to stab him through the gate. Also, during the second altercation with Barrientos, Arteaga was coming to the defense of Barrientos as he was being beaten by Aduata, Garcia and Sanchez. Thus, Aduata provoked Arteaga into trying to intervene on his friend's behalf. At no point did Aduata withdraw from the melee. Keeping *Oropeza* and *Johnston* in mind, Aduata cannot claim provocation based on events for which he was culpably responsible.

In Aduata's version of events, he merely brandished the knife and held it at his side during the second interaction with

Arteaga. If his testimony was credited by the trial court, it did not support a finding that Aduata engaged in homicidal conduct in a heat of passion. Rather, his testimony supported acquittal. Regardless, pursuant to *Oropeza* and *Johnston*, we conclude that Aduata cannot claim he was provoked by Arteaga after Aduata provoked Arteaga into coming outside and then continually engaged him. Accordingly, we conclude there was no instructional error.

c. *Counts 1, 3, 4 and 5 (Natural and Probable Consequences).*

In *Woods*, the court held that an aider and abettor can be convicted of an uncharged, lesser nontarget crime than the nontarget crime committed by the actual perpetrator. (*Woods*, *supra*, 8 Cal.App.4th at pp. 1586–1588.) In dicta, the court stated, "If the evidence raises a question whether the offense charged against the aider and abettor is a reasonably foreseeable consequence of the criminal act originally aided and abetted but would support a finding that a necessarily included offense committed by the perpetrator was such a consequence, the trial court has a duty to instruct sua sponte on the necessarily included offense as part of the jury instructions on aider and abettor liability. Otherwise . . . the jury would be given an unwarranted, all-or-nothing choice concerning aider and abettor liability. [¶] However, the trial court need not instruct on a particular necessarily included offense if the evidence is such that the aider and abettor, if guilty at all, is guilty of something beyond that lesser offense, i.e., if the evidence establishes that a greater offense was a reasonably foreseeable consequence of the criminal act originally contemplated, and no evidence suggests otherwise. [Citations.]" (*Id.* at p. 1593.)

Without weighing in on whether the *Woods* dicta should be adopted as precedent, we conclude that it would not help Garcia and Sanchez in this case. Because Aduata, Garcia and Sanchez—gang members who precipitated a confrontation with Barrientos—discussed Aduata having a knife, and because they repeatedly engaged in altercations with Barrientos and Arteaga, murder and attempted murder were foreseeable consequences of the battery that Garcia and Sanchez aided and abetted. Moreover, there was no evidence establishing that murder and attempted murder were not foreseeable consequences.

2. Failure to instruct on involuntary manslaughter as a lesser included offense of murder.

"Involuntary manslaughter is a lesser included offense of murder[.]" (*People v. Munoz* (2019) 31 Cal.App.5th 143, 153.) There are three types of acts resulting in an unlawful killing that can support the offense: a misdemeanor, a lawful act, or a noninherently dangerous felony. "[F]or all three types of predicate acts the required mens rea is criminal negligence[.]" (*People v. Butler* (2010) 187 Cal.App.4th 998, 1006 (*Butler*); § 192, subd. (b).)[11] Criminal negligence does not involve malice, i.e., the specific intent to kill or conscious disregard for life necessary for murder. Instead, it involves mens rea short of malice: a disregard for human life or an indifference to the consequences of

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[11] Section 192, subdivision (b) provides that manslaughter is defined as involuntary when it involves an unlawful killing of a human being without malice "in the commission of a unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection."

the defendant's actions. (*Ibid.*; *People v. Cook* (2006) 39 Cal.4th 566, 596.)

Garcia and Sanchez posit that "the trial court was obligated to instruct [the] jury on involuntary manslaughter based on the evidence supporting [their] own commission . . . of that lesser included offense as a result of [proximately causing Barrientos's death by] engaging in the crimes of misdemeanor battery and/or misdemeanor disturbing the peace with criminal negligence[.]" In support, Garcia and Sanchez cite *Gonzalez*—a provocative act doctrine case—and go on to suggest that California recognizes a version of involuntary manslaughter in which a defendant, without aiding and abetting a codefendant, commits a misdemeanor that proximately causes a codefendant to commit an unlawful killing.

Simply put, the provocative act doctrine discussed in *Gonzalez* does not apply because Barrientos, the victim of the crimes, was not provoked into killing Garcia and Sanchez's accomplice or an innocent bystander. (*Cervantes*, *supra*, 26 Cal.4th at p. 867 ["The provocative act murder doctrine has traditionally been invoked in cases in which the perpetrator of the underlying crime instigates a gun battle, either by firing first or by otherwise engaging in severe, life-threatening, and usually gun-wielding conduct, and the police, or a victim of the underlying crime, responds with privileged lethal force by shooting back and killing the perpetrator's accomplice or an innocent bystander"].) Further to the point, *Gonzalez* did not suggest the urged version of involuntary manslaughter.[12]

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[12] *People v. Roberts* (1992) 2 Cal.4th 271 (*Roberts*), also cited by Garcia and Sanchez, does not shore up their position. It stated that "principles of proximate cause may sometimes assign

Ultimately, because Garcia and Sanchez did not themselves kill Barrientos while perpetrating one of the prescribed acts under the law of involuntary manslaughter, this case did not trigger the need for the advocated jury instruction.

3. Failure to instruct on battery as a lesser related offense.

Battery is a lesser related offense of murder or attempted murder rather than a necessarily included offense. (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1707.) Under *Birks*, Garcia was not entitled to an instruction on battery because the prosecution did not consent. According to Garcia, *Birks* is not controlling because its policies are not implicated in this case, there was implied consent, and the prosecution was estopped from relying on *Birks*. We reject these arguments. Based on our reading of *Birks*, it requires express consent, which was lacking here, and it does not provide for a policy based or estoppel exception. *Birks* is binding, and we therefore must follow it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity Sales*).)

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homicide liability when, foreseeable or not, the consequences of a dangerous act directed at a second person cause an impulsive reaction that so naturally leads to a third person's death that the evil actor is deemed worthy of punishment." (*Id.* at p. 317.) Though *Roberts* did not refer to the provocative act doctrine, it did so in substance. For the same reasons as *Gonzalez*, *Roberts* is inapposite. *People v. Lee* (1999) 20 Cal.4th 47, 60–61 and *Butler*, *supra*, 187 Cal.App.4th at pp. 1006–1007 are unavailing for Garcia and Sanchez because they do not support the novel theory being advanced in this appeal.

4. Failure to instruct on the requirements of self-defense as that defense related to the uncharged crime of battery with respect to counts 1, 3, 4 and 5.

The trial court instructed the jury that to prove aiding and abetting liability on each of the counts under the natural and probable consequences doctrine, the prosecution had to prove, among other things, that Sanchez was guilty of battery of Barrientos.[13] Sanchez contends that the trial court committed

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[13] Because an "aider and abettor under the natural and probable consequences doctrine . . . must know of and intend to assist the perpetrator's target crime (or must commit the target crime himself)" (*People v. Lisea* (2013) 213 Cal.App.4th 408, 415), the trial court may have thought it was instructing the jury that it could find Sanchez guilty of battery on Barrientos either because he committed battery on Barrientos himself or he aided Aduata's battery on Barrientos. Certainly this broad view is supported by CALCRIM No. 401, the standard aiding and abetting instruction given by the trial court. And it is supported by binding case law. (*Prettyman*, *supra*, 14 Cal.4th at p. 267.) But CALCRIM No. 403—the standard natural and probable consequences instruction that was also given—narrows aiding and abetting liability under the natural and probable consequences doctrine to situations where the defendant committed the target offense and where, during the commission of the target offense, a coparticipant in the target offense committed the nontarget offense. As applied to the facts of this case, CALCRIM No. 403 required the jury to find that Sanchez was a direct perpetrator of a battery on Barrientos, and that during the battery, Aduata was a coparticipant who committed nontarget crimes against Barrientos and Arteaga. To the degree CALCRIM No. 403 does not accurately state the law because it diverges from *Prettyman* by narrowing a defendant's criminal exposure, it benefited Sanchez.

two related errors pertaining to self-defense: (1) not including a reference to battery when giving CALCRIM No. 3470, the standard jury instruction on self-defense in which the defendant did not commit homicide, and (2) not instructing, as to battery, on both alternatives set forth in CALCRIM No. 3470 regarding the belief Sanchez needed to harbor to justify acting in self-defense.[14]

Due to Sanchez's failure to object or ask for a clarification, the issue was forfeited. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1051 [if a defendant believes an instruction is incomplete, he or she has an obligation to request clarifying language].) However, pursuant to section 1259, we have the discretion to review

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[14] The People maintain that the only issue is whether Aduata acted in self-defense, arguing that under *Prettyman* the focus should be on the target offense that he committed. But, as we have indicated, the trial court instructed the jury it had to find that Sanchez committed the target offense. Also, in closing argument, the prosecutor stated, ". . . I have to prove . . . that Mr. Garcia and Mr. Sanchez are guilty of battery. Clearly, they are. You've seen the video. They're out there, they're kicking [Barrientos], they're beating [Barrientos], not just once but twice." Also, the prosecution presumably agreed to the jury instruction on natural and probable consequences even though it was not as broad as the rule in *Prettyman* dictates. The People have offered no support for the idea that the prosecution's theory of the case is immaterial on appeal, or that on appeal the People can argue for criminal liability based on a factual issue the jury was not asked to decide. In general, case law prohibits parties to appeals from arguing new theories based on issues of fact. (*Panopulos v. Maderis* (1956) 47 Cal.2d 337, 340.) Borrowing from another case, we conclude that the "People may not . . . alter their position on appeal." (*People v. Burnett* (1999) 71 Cal.App.4th 151, 173.)

whether the claimed instructional error affected Sanchez's substantial rights. "Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether asserted error would result in prejudice if error it was." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.)

As a preliminary matter, we summarize the instructions relevant to our inquiry.

The trial court's instruction pursuant to CALCRIM No. 960 informed the jury that Sanchez did not commit battery if he acted "in self-defense or in defense of someone else." But that instruction did not explain what the jury was supposed to consider when deciding this issue. Specifically, it did not mimic the full text of CALCRIM No. 3470 and state that Sanchez must have believed that he or another person was in imminent danger of suffering bodily injury or, alternatively, being touched unlawfully. Elsewhere, pursuant to CALCRIM No. 505, the jury was informed of the relevant considerations for self-defense and defense of others as it relates to murder, attempted murder, voluntary manslaughter, and attempted voluntary manslaughter, including that Sanchez must have reasonably believed that he or another person was in imminent danger of being killed or suffering great bodily injury. Pursuant to CALCRIM No. 3470, the jury was told that for self-defense or defense of others related to assault with a deadly weapon, Sanchez had to reasonably believe that he or another person was in imminent danger of suffering bodily injury. The trial court omitted reference to the alternative offered by CALCRIM No. 3470, i.e., the defense could be triggered if Sanchez reasonably believed that he or another

person was in imminent danger of suffering an unlawful touching.

We "assume that jurors are intelligent persons capable of understanding and correlating all jury instructions which are given and, where reasonably possible, we interpret the instructions to support the judgment." (*People v. Jo* (2017) 15 Cal.App.5th 1128, 1152.) Therefore, we assume the jury understood that self-defense and defense of others were defenses to battery based on CALCRIM No. 960, and that the jury referred to CALCRIM No. 3470 when deciding whether that defense dictated a finding that Sanchez did not commit battery. There was no prejudicial error based purely on the absence of a reference to battery in the CALCRIM No. 3470 instruction.

Further, we reject the contention that the trial court was required to give both alternatives offered by CALCRIM No. 3470 for the type of belief Sanchez had to harbor to justify acting in self-defense. In essence, Sanchez argues that the jury should have been instructed that a right to self-defense could be triggered if he had a reasonable belief in a danger of imminent bodily injury or unlawful touching. Sanchez did not cite any case law supporting his theory that the CALCRIM No. 3470 language at the center of his argument accurately restates the law. Rather, he cited CALCRIM No. 3470 itself, which is not law. (*People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7 ["we caution that jury instructions, whether published or not, are not themselves the law, and are not authority to establish legal propositions or precedent[s]"].) Nor did he cite any law requiring a trial court to give both options to a jury. For this reason, we deem the argument forfeited. (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050.)

B. *Improperly Formulated Instructions.*

We independently determine whether instructions correctly state the law, and whether instructions "effectively direct a finding adverse to a defendant by removing an issue from the jury's consideration. [Citations.]" (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "When a defendant claims an instruction was subject to erroneous interpretation by the jury, he must demonstrate a reasonable likelihood that the jury misconstrued or misapplied the instruction in the manner asserted. [Citation.] In determining the correctness of jury instructions, we consider the entire charge of the court, in light of the trial record. [Citation.]" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 926 (*Covarrubias*).)

1. Failure to instruct the jury that the attempted premeditated murder of Arteaga in count 3 had to be a reasonably foreseeable consequence of Sanchez's and Garcia's battery of Barrientos.

The trial court instructed the jury that for Garcia and Sanchez to be guilty of attempted murder, it had to find, among other things, that a reasonable person in their position would have known that Aduata's commission of attempted murder of Arteaga was a natural and probable consequence of their battery of Barrientos.

Garcia and Sanchez argue that the instruction was wrongly formulated because the jury should have been required to find that attempted *premeditated* murder was a natural and probable consequence of battery of Barrientos. They acknowledge that this argument was rejected in *People v. Favor* (2012) 54 Cal.4th 868,

879–880 (*Favor*).[15] Nonetheless, they argue that *Alleyne v. United States* (2013) 570 U.S. 99 (*Alleyne*) countermands *Favor* and compels reversal. We decline to reach this issue because, as a matter of stare decisis, *Favor* is binding. (*Auto Equity Sales, supra*, 57 Cal.2d at p. 455.)

2. Limitation on defendants' use of a voluntary intoxication defense.

With respect to count 1, the trial court gave a modified version of CALCRIM No. 625 and instructed the jury that it could consider Aduata's voluntary intoxication to decide only whether he acted with intent to kill, or acted with deliberation and premeditation.

Aduata argues that the jury should have been permitted to consider his voluntary intoxication in deciding whether he acted in imperfect self-defense. Garcia joins. In Aduata's reply brief, however, he concedes there was no error in light of *People v. Soto* (2018) 4 Cal.5th 968, 970, which held that "CALCRIM No. 625 correctly permits the jury to consider evidence of voluntary intoxication on the question of whether defendant intended to kill but not on the question of whether he believed he needed to act in self-defense."

We find no error.

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[15] The validity of *Favor* in light of *Alleyne* is under review in *People v. Mateo* (review granted May 11, 2016, S232674). *Alleyne* held that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt. [Citation.]" (*Alleyne*, *supra*, 570 U.S. at p. 103.)

3. Incomplete statement regarding imperfect defense of self and others.

In connection with CALCRIM No. 571, the instruction on voluntary manslaughter based on imperfect self-defense as to count 1, the trial court informed the jury that "[i]mperfect self-defense does not apply when the defendant, through his own wrongful conduct, has created circumstances that justify his adversary's use of force."

Aduata and Garcia argue that this portion of the instruction is an incomplete statement of the law because a defendant who provokes a fight may regain the right of imperfect self-defense if the victim responds with unlawful deadly force. (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179–1180; *People v. Frandsen* (2011) 196 Cal.App.4th 266, 273.) Using this assertion as a springboard, they argue that they were prejudiced because Barrientos's use of the baton against Sanchez was unlawful deadly force and Aduata therefore had a viable claim of imperfect defense of others.

Sanchez and Aduata argue that CALCRIM No. 571 and CALCRIM No. 604 were erroneous because they did not adequately convey that the jury could consider whether Aduata acted in imperfect defense of others. (*People v. Randle* (2005) 35 Cal.4th 987, 1003–1004 [trial court should have instructed on imperfect self-defense of others].)

We find no error.

In essence, these arguments are two sides of the same coin and boil down to defendants arguing that the instructions took an imperfect defense of others issue away from the jury's consideration. In other words, they argue that the instructions, as given, were likely interpreted by the jury to mean that imperfect defense of others was not available even if Barrientos

responded to provocation with unlawful deadly force by attacking Sanchez with a deadly baton. As for prejudice, Aduata argues, "The evidence allowed a reasonable jury to conclude [he] actually believed he needed to stab Barrientos even if the jury rejected Aduata's testimony as to how that happened in favor of [Garcia's father's version of events]. Under these circumstances, [Aduata] could have believed he was defending 'everyone[,]' including himself[,] from any more attacks by [Barrientos] and his deadly baton."

Following *Covarrubias*, we must examine the jury's whole charge in light of the evidence at trial to determine if this argument has merit.

CALCRIM No. 571 provided that Aduata acted in imperfect self-defense if he actually believed he was in imminent danger of being killed or suffering great bodily injury; he actually believed that the immediate use of deadly force was necessary to defend against the danger; and at least one of those beliefs was unreasonable.

CALCRIM No. 604 regarding imperfect self-defense related to an attempted killing stated, in part, that the "defendant must have actually believed there was imminent danger of violence to himself or someone else."

The trial court gave CALCRIM No. 3470, the instruction regarding perfect self-defense and defense of others. Then it gave CALCRIM No. 3471, informing the jury that a person who engages in mutual combat or who starts a fight has a right of self-defense only if he tried to stop fighting, and if he indicated to his opponent, by words or conduct, that he wanted to stop fighting and had stopped fighting. If, under those circumstances, the opponent kept fighting, the defendant had a right of self-

defense. The instruction next informed the jury that "if the defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting or communicate the desire to stop the opponent, or to give the opponent a chance to stop fighting." Finally, the trial court gave CALCRIM No. 3474 and instructed the jury that "[t]he right to use force in self-defense or defense of another continues only as long as the danger exists or reasonably appears to exist. When the attacker withdraws or no longer appears capable of inflicting any injury, then the right to use force ends."

Though CALCRIM No. 3471 related to mutual combat and followed the perfect self-defense and defense of others instruction, and though it did not refer to imperfect defense of others, it—in conjunction with CALCRIM No. 3474—generally indicated when an opponent's use of deadly force was not justified, and when the right to use force in self-defense or defense of others would end. And CALCRIM NO. 604 conveyed that imperfect defense of others was a defense if the defendant believed there was imminent danger to another. Applied here, we assume the jurors were capable of understanding that imperfect defense of self or another was an available defense if defendants used nondeadly force, Barrientos responded with unlawful deadly force, Barrientos remained capable of inflicting injury on Sanchez or others, and Aduata actually believed both that Sanchez was in imminent danger of being killed or suffering great bodily injury and immediate use of deadly force was

necessary. (*Covarrubias*, *supra*, 1 Cal.5th at p. 915 [presumption that jurors understood and correlated all instructions].)

4. Mistake in CALCRIM No. 604, the instruction on imperfect self-defense for attempted voluntary manslaughter (count 3).

CALCRIM No. 604, given by the trial court, instructed the jury that an "attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if the defendant attempted to kill a person because he acted in imperfect self-defense." The instruction explained that the defense required: (1) the defendant took at least one direct but ineffective step toward killing a person; (2) the defendant intended to kill when he acted; (3) the defendant believed that he was in imminent danger of being killed or suffering great bodily injury; and (4) the defendant believed that the immediate use of deadly force was necessary to defend against danger; but (5) "[t]he defendant's beliefs were unreasonable."

CALCRIM No. 571—the instruction explaining that a "killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense"—stated that the defense required: "(1) the defendant actually believed that he was in imminent danger of being killed or suffering great bodily injury; [¶] AND [¶] (2) the defendant actually believed the immediate use of deadly force was necessary to defend against the dangers; [¶] BUT [¶] (3) at least one of those beliefs was unreasonable." The instruction noted that "[t]he difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable."

The two instructions are inconsistent because CALCRIM No. 604 incorrectly requires both beliefs to be unreasonable whereas CALCRIM No. 571 correctly requires only one to be. (*People v. Her* (2009) 181 Cal.App.4th 349, 353–355 (*Her*).) Aduata and Sanchez argue that this mistake in CALCRIM No. 604 caused them prejudice because, as the defendant in *Her* argued, "the jury could have understood the instructions to require acquittal if both beliefs were reasonable . . . , a verdict of attempted voluntary manslaughter if both beliefs were unreasonable, but a verdict of attempted *murder* if one belief was reasonable and one was unreasonable." (*Her*, *supra*, at p. 354.) As a matter of semantics, the "jury could have understood the instructions to require a *harsher* verdict for a partially reasonable belief in the need to defend himself or [another] than for a completely unreasonable belief in that regard." (*Ibid.*)

Here, as in *Her*, the trial court gave CALCRIM No. 505, the pattern instruction on self-defense or defense of another. (*Her*, *supra*, 181 Cal.App.4th at p. 353.) After examining the instructions as a whole, the *Her* court rejected the defendant's prejudice argument, stating, "We find no reasonable likelihood that the instructions, considered in their entirety, could have been understood in the manner defendant suggests. [Citation.]" (*Id.* at p. 354.) Because the jury in *Her*, just like the jury below, had been instructed that "'[t]he difference between complete self-defense or defense of another and imperfect self-defense or imperfect defense of another depends on whether the defendant's belief in the need to use deadly force was reasonable,'" the court concluded that "the jury would have understood from the instructions as a whole that the reasonableness of that belief (or those beliefs, if broken into components) went to whether

defendant was guilty of attempted voluntary manslaughter or no crime at all, and not to whether he was guilty of attempted murder." (*Ibid*.)

Her is on point and based on sound reasoning, and we opt to follow it. We find no error.

5. Failure to instruct that the elements of the charged crimes and sentencing enhancements must be proven beyond a reasonable doubt.

Using CALCRIM No. 220, the trial court informed the jury that a criminal defendant is presumed innocent, and that this "presumption requires that the People prove a defendant guilty beyond a reasonable doubt." The trial court also stated: "Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt, unless I instruct you otherwise." Other instructions stated "the People must prove that" and listed, respectively, the elements regarding aiding and abetting, natural and probable consequences, battery, murder, premeditation and deliberation, attempted murder, assault with a deadly weapon, defenses to the charges, and the gang allegations.

At no point did the trial court specifically say that the jury must find each element of a crime, defense, doctrine or allegation to be proven beyond a reasonable doubt, and Garcia finds this objectionable. This argument has been repeatedly rejected, and we have no cause to revisit it.

People v. Riley (2010) 185 Cal.App.4th 754, 770, held: "The CALCRIM No. 220 instruction . . . combined with the court's instruction that the People must prove each element of the offense (which is given whenever the court instructs on the elements of an offense), adequately informs the jury that it must find each element has been proved beyond a reasonable doubt."

People v. Wyatt (2008) 165 Cal.App.4th 1592, 1601 reached the same conclusion. In *Covarrubias*, the defendant argued that the burden of proof instruction "is inadequate because it fails to inform jurors that 'every element' of the charges must be proved beyond a reasonable doubt," and our Supreme Court rejected this argument on two grounds. (*Covarrubias*, *supra*, 1 Cal.5th at p. 911.) The defendant forfeited the claim of error by not seeking amplification or clarification of the standard instruction. Also, citing *People v. Thomas* (2011) 52 Cal.4th 336, 356, the court stated, "In any event, we have previously rejected a similar claim. [Citation.]" (*Covarrubias*, at p. 911.) *Covarrubias* is binding on us. (*Auto Equity Sales*, *supra*, 57 Cal.2d at p. 455.)

6. Defects in the gang evidence instructions.

Pursuant to CALCRIM No. 1403, the jury was instructed that it could "consider evidence of gang activity only for the limited purpose of deciding whether: [(1)] [t]he defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related crimes and enhancements charged; [¶] AND [¶] [(2)] [t]he defendant had a motive to commit the crimes charged; [¶] AND [¶] [(3)] [t]he defendant actually believed in the need to defend himself." Elsewhere in the same instruction, the jury was told that it could "consider this evidence when [it] evaluate[s] the credibility or believability of a witness and when [it] consider[s] the facts and information relied on by an expert witness in reaching his opinion[.]" Further, the jury was told that it could "not consider this evidence for any other purpose" and could not conclude from it "the defendant is a person of bad character or that he or she has a disposition to commit crime."

By way of CALCRIM No. 332, the jury was directed, inter alia, to "decide whether information on which the expert relied was true and accurate."

First, Aduata and Garcia argue these instructions wrongly permitted the jury to use gang-related crimes evidence when considering premeditation, intent to kill, purpose, knowledge, and reasonable and unreasonable self-defense. But, as case law consistently holds, such uses were proper. "[A]s [a] general rule, evidence of gang membership and activity if admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223 [gang evidence can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to a charged crime]; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167–1168 [gang evidence is relevant to prove motive for gang-related crimes and for assessing witness credibility]; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1252–1253 [evidence of defendant's gang membership relevant to whether member genuinely believed the need for self-defense].)

Second, they contend that the instructions failed to specify limits on how each type of admitted gang evidence could be used. As a corollary, they argue that jurors "should not have been led to believe all the gang evidence, so-called 'primary activities,' expert opinions, and expert examples of other 'gang tag crews' were relevant on all the substantive intent and self-defense issues. This posed a serious risk of unfair use of improper evidence to shore up the prosecution's theory [that the melee] was a premeditated and deliberated murder and attempted murder to benefit the IFC." Aduata and Garcia offer no legal authority to

support their position. And, as discussed in the preceding paragraph, gang evidence can be considered with respect to a variety of issues. It was proper for the jury to consider the gang evidence when deciding premeditation, deliberation, motive and purpose.

Third, they assign error on the ground that the trial court failed to instruct the jury that it could not consider other crimes or gang activity unless they were proven by a preponderance of the evidence. Notably, however, CALCRIM No. 220 informed the jury that the prosecutor had to prove the case beyond a reasonable doubt. This default burden of proof applied given that CALCRIM No. 1403 was silent regarding the prosecution's burden of proof for gang activity. Aduata and Garcia were not prejudiced; rather, they benefited because the instructions required a higher burden of proof than the preponderance of the evidence standard.

IV. Right to Public Trial.

Prior to jury selection, the trial court stated: "Well, I was just told that we have 121 people, which is more than we need. None of the [defendants'] family members are going to be able to come into the courtroom. I can tell you this, that every single seat in the courtroom will be used, so. And there will be jurors and we have 65 seats in the audience . . . ; and then you can just do the math of how many seats there are here. We're going to add some seats in the front. I think we wind up with about 90 seats, 90 jurors." The trial court later stated it did not want family members to make statements in the presence of the jurors. It then stated, "It's going to create problems for me [if statements are made in the presence of jurors]. And so I don't want to exclude people from the courtroom for the trial, I don't want to

ban them from the building if I find that there's been some untoward, even innocent conduct that spills over into trying to influence this jury. I've seen all kinds of things in the past, and I'm pretty vigilant about it." According to the trial court, it wanted to make sure that people interested in the case stayed at least 30 to 50 feet away from jurors throughout the trial. On the heels of these statements, the trial court asked, "Do you have any other questions about it?" Counsel representing defendants did not ask questions or object.

Voir dire commenced on August 29, 2016. While certain colloquy was transcribed by the court reporter, the voir dire itself was not transcribed. On August 31, 2016, the last day of voir dire, the trial court noted there was "somebody who has an interest in this case who is in the audience" and instructed that person and any other spectator to "stay a good distance away" from the prospective jurors at all times. Later that same day, the alternates were selected and the jury was empaneled.

A defendant has a right to a public trial (U.S. Const., 6th & 14th Amends.; Cal. Const. art. 1, § 15) that extends to jury selection. (*Presley v. Georgia* (2010) 558 U.S. 209, 210-216 (*Presley*); *People v. Bui* (2010) 183 Cal.App.4th 675, 680 (*Bui*).) "[W]ithout exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present[.]" (*In re Oliver* (1948) 333 U.S. 257, 271–272.) Though there are instances when the right can be overridden, space limitations in a courtroom and generic concerns over jurors overhearing remarks from observers do not count among them. (*Bui*, *supra*, 183 Cal.App.4th at p. 680; *Presley*, *supra*, 558 U.S. at pp. 210–216.) The denial of a public trial is structural error requiring automatic reversal. (*Arizona v. Fulminante* (1991) 499

U.S. 279, 310; *Weaver v. Massachusetts* (2017) 137 S.Ct. 1899, 1905.) But the right is waived unless preserved by an objection. (*People v. Edwards* (1991) 54 Cal.3d 787, 813 ["'the constitutional guarantee of a public trial may be waived by acquiescence of the defendant in an order of exclusion'"].)

At no point did defendants object to the exclusion of their families. Thus, defendants failed to preserve this constitutional issue for review. Though they contend objecting would have been futile and they can now raise the issue on appeal (*People v. Hill* (1998) 17 Cal.4th 800, 821), nothing in the record indicates that the trial court would not have allowed defendants' families the right to be present at voir dire if defendants had timely objected and insisted upon their right to a public trial. If the trial court had been alerted to the right—one which requires automatic reversal if violated—we have no doubt the right would have been accommodated. Simply put, the trial court did not say anything to suggest resistance toward this important constitutional right.

V. Cumulative Error.

Because we reject all of defendants' individual claims for error, we have no error to cumulate. (*People v. McWhorter* (2009) 47 Cal.4th 318, 377.)

VI. Senate Bill No. 1437.

Senate Bill No. 1437 (2017-2018 Reg. Sess.) "was enacted to 'amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.' [Citation.]" (*People v. Martinez* (2019) 31 Cal.App.5th 719, 723 (*Martinez*).) It amended sections

188 and 189. Also, it added section 1170.95, subdivision (a) to provide that a defendant "convicted of felony murder or murder under a natural and probable consequences theory [may] file a petition with the court that sentenced the petitioner to have the . . . murder conviction vacated and to be resentenced on any remaining counts" when listed conditions apply. (*Martinez*, *supra*, 31 Cal.App.5th at p. 723.)

Based on Senate Bill No. 1437, Sanchez argues that because the prosecutor argued and the jury was instructed that he was criminally liable, if it all, on a natural and probable consequences theory, his convictions on counts 1 and 3 should be reversed because that doctrine is no longer valid. Garcia also seeks reversal of those convictions. He argues that in light of Senate Bill No. 1437, it was error for the trial court to instruct on a natural and probable consequences theory.[16]

Senate Bill No. 1437 could mitigate Sanchez's and Garcia's criminal liability given that it applies retroactively because their convictions are not final. (*In re Estrada* (1965) 63 Cal.2d 740, 742.) But it does not support reversal of their murder and attempted murder convictions in connection with the current appeal. When the Legislature creates a procedure such as section 1170.95, subdivision (a) so that criminal defendants may apply to reduce criminal liability, that procedure must be followed. Consequently, relief will not be granted on direct appeal of a conviction if it was valid under the prior law. (*People v. DeHoyos*

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[16] We do not view the issue as a question of instructional error. Rather, the issue is simply whether Garcia's criminal liability has been retroactively abrogated, and whether relief can be granted directly on appeal.

(2018) 4 Cal.5th 594, 597, 603 [with respect to Proposition 47, a defendant is not entitled to automatic resentencing on appeal and must instead follow the statutory procedure]; *People v. Conley* (2016) 63 Cal.4th 646, 652 [same with respect to Proposition 36].) We decline to apply Senate Bill No. 1437 directly on appeal. Garcia and Sanchez must file section 1170.95 petitions in the sentencing court.

DISPOSITION

The judgments are affirmed.

_____, J.
ASHMANN-GERST

I concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT